IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHARLES ALLEN HILLS, Petitioner.	)	2 CA-CR 2007-0084-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041862

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 A jury found petitioner Charles Allen Hills guilty of theft of a means of transportation by controlling stolen property and third-degree burglary. The trial court sentenced him to concurrent, mitigated and slightly mitigated, three- and five-year prison terms, and we affirmed the convictions and sentences on appeal. *State v. Hills*, No. 2 CA-

CR 2005-0073 (memorandum decision filed Nov. 30, 2005). In a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Hills asserted trial counsel had been ineffective in failing to secure the attendance of three defense witnesses at trial and failing to file a motion to suppress evidence. On review, Hills challenges the trial court's denial of relief on the first of those two claims, arguing only about two of the witnesses, and the court's refusal to hold an evidentiary hearing. We review only for a clear abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 To establish ineffective assistance of counsel, a petitioner must show that counsel's performance fell below prevailing professional norms and caused prejudice to the defense. *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). A petitioner is entitled to an evidentiary hearing only if he or she presents a colorable claim—"one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). To some extent, the determination whether a claim is colorable rests in the discretion of the trial court. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). But, if there is doubt about whether a claim is colorable, the trial court should hold an evidentiary hearing "to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶3 As the trial court noted in its minute entry denying relief, counsel's decisions on matters of trial strategy and tactics will not support a claim for ineffective assistance as

long as there was some reasoned basis for those decisions. *See State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984); *see also State v. Rodriguez*, 126 Ariz. 28, 33, 612 P.2d 484, 489 (1980) ("In general, the power to control trial strategy belongs to counsel."). Selecting which witnesses to call at trial "is a tactical, strategic decision." *Lee*, 142 Ariz. at 215, 689 P.2d at 158.

¶4 The facts necessary to our review of Hills's claim are these. Sheriff's deputies responding to an early morning call of a "man down" found a man later identified as Hills slumped behind the wheel of a stolen car in the parking lot of an apartment complex. The driver's side door was partially open, and Hills appeared to be asleep until he was roused by one of the deputies. Although there was no key in the car's ignition, the ignition was turned to the alternator position, and the car's door chime was sounding. Able to rotate the broken ignition switch without a key, one deputy turned the ignition off. In a sheath on Hills's belt was a large knife that proved to have gouges in its blade. In his pocket, the deputies found a handcuff key and a set of "jiggle or manipulation" keys of the sort sometimes used by car thieves, including one that started the car Hills had occupied.

¶5 Hills's defense was that he had not driven the car but had only been a passenger and had no idea the car was stolen. He claimed he had gone to a bar the night before with "a couple of friends" and, after getting extremely intoxicated and sick, had accepted a ride from a man at the bar, who had offered to drive him home. On the way, Hills testified, the man—whom Hills variously claimed to have met "a few times," "[m]aybe

twice," or "[p]robably" once before "in passing at the bar"—said he needed to stop by his apartment first. At that point, Hills claimed to have "passed out for a good part of the night." He maintained he had been found in the driver's seat the next morning because he had been unable to unlock the passenger-side door when he thought he was going to be sick again so had crawled across to the driver's side and opened that door.

¶6 According to the petition for post-conviction relief, the witnesses Hills claims counsel should have secured for trial were the two friends he said had taken him to the bar the previous evening, James Fleming and Bernadette Unterbrink, and Unterbrink's aunt, Roxanne Love, with whom Hills had apparently been living. Hills contends they would have corroborated his defense. At trial, Hills identified the man he claimed had given him a ride as "Mike McCormick," although he had not provided that name on the morning of his arrest. At the scene, he had first told one of the deputies he was in the stolen car because he was waiting for a friend to return to the car, but he could not identify the friend. Later, Hills told a detective who had subsequently arrived that the driver's name was "Mike McHugh."

¶7 In declining to hold a hearing and denying relief, the trial court noted Hills's failure to supply an affidavit from any of the witnesses setting forth the substance of their proposed trial testimony. Hills contends such affidavits were unnecessary, arguing that transcripts of statements Fleming, Love, and Unterbrink had given to a defense investigator before trial, which Hills included as exhibits in an appendix to the petition, were sufficient

to show the information available to trial counsel when he was deciding what witnesses to call. But unsworn statements to an investigator do not take the place of the affidavits or testimony typically required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim that witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

¶8 In a colloquy with the court during trial, counsel stated that neither Unterbrink nor Love could supply eyewitness testimony about Hills's having left the bar as a passenger in the stolen vehicle but instead "would essentially be corroborating" Hills's testimony. We interpret counsel's election to forgo their testimony once they proved to be unavailable as reflecting counsel's professional assessment that neither woman's testimony was essential to the defense. Fleming was by then serving a sentence in the Department of Corrections for what were apparently his fourth and fifth felony convictions since 2002 for drug and weapons offenses. His potential lack of credibility is self-evident, and his dubious utility to the defense was underscored by the prosecutor's comment that the state, too, had been attempting to secure Fleming's presence at trial.

¶9 Trial counsel's knowledge of what each witness's testimony would likely be, what it might add to Hills's defense, and what kind of appearance each witness would make

before the jury supports the trial court's implicit finding that counsel had made an informed, reasonable, strategic decision that the testimony of Hills's friends was dispensable under the circumstances. *See State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984) (proper for counsel not to call witnesses who will not aid defendant's case); *Lee*; *State v. Workman*, 123 Ariz. 501, 503, 600 P.2d 1133, 1135 (App. 1979) ("Especially when the question is whether or not to call a particular witness, courts are reluctant to second-guess the attorney."). And we note the absence of an affidavit or any other extrinsic support for Hills's bare assertion that counsel's decision not to call these witnesses fell below an objectively reasonable professional standard of care. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725 (colorable claim of ineffective assistance requires demonstration that counsel's representation "fell below the prevailing objective standards").

¶10 Finding no abuse of the trial court's discretion in deeming Hills's claim not colorable and denying relief without an evidentiary hearing, we grant the petition for review but likewise deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge